

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

**FILED BY CLERK**

**DEC -2 2009**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0208-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
MONTE EUGENE JENKINS,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20023878

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Monte Eugene Jenkins

Yuma  
In Propria Persona

E S P I N O S A, Presiding Judge.

¶1 Petitioner Monte Jenkins seeks review of the trial court's denial of relief on the third petition for post-conviction relief he has filed pursuant to Rule 32, Ariz. R. Crim. P., since pleading guilty to six felony offenses in 2004. We will not disturb a trial court's grant or denial of post-conviction relief unless the court has clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 Pursuant to a plea agreement, Jenkins pled guilty to two counts each of attempted second-degree murder, aggravated assault with a deadly weapon, and aggravated assault causing serious physical injury. He was sentenced to a combination of partially aggravated prison terms totaling thirty years' incarceration. In addition to his two previous petitions for post-conviction relief, he has also filed two unsuccessful petitions for review of the trial court's denial of relief.

¶3 In his first, of-right petition, Jenkins asserted sentencing error and ineffective assistance of trial counsel and also alleged there had been an insufficient factual basis for his guilty pleas to the two counts of attempted second-degree murder. The trial court directed the Arizona Department of Corrections to recalculate Jenkins's sentences but otherwise denied relief. This court denied relief on the corresponding petition for review, in which Jenkins challenged the trial court's ruling on one issue only, the sufficiency of the factual basis for his pleas to attempted murder. *State v. Jenkins*, No. 2 CA-CR 2006-0014-PR (memorandum decision filed Sept. 21, 2006).

¶4 In 2008, Jenkins filed his second petition, nominally asserting ineffective assistance of Rule 32 counsel in his first, of-right proceeding but further claiming that the trial court had relied on improper factors to enhance and aggravate his sentences, that his guilty pleas were not fully informed and voluntary, and that trial counsel had been ineffective. The trial court denied relief, as did this court on Jenkins's petition for review of the lower court's ruling. *State v. Jenkins*, No. 2 CA-CR 2008-0343-PR (memorandum decision filed Apr. 8, 2009).

¶5 He then initiated the present proceeding in May 2009, attempting to avoid the preclusive effect of Rule 32.2 by seeking leave to “amend” the 2008 petition.<sup>1</sup> As the trial court wrote in its minute entry ruling, however, “the Petition has already been denied, and the Petition for Review has been denied by the Court of Appeals. Therefore, the request to amend the Petition is untimely and the filing will be treated as a new Petition for Post-Conviction Relief.”

¶6 Treating Jenkins’s request to amend as a new petition for post-conviction relief, the trial court reviewed the claims raised<sup>2</sup> and determined all were precluded:

Petitioner raises a multitude of issues that were previously litigated in both this court and the Court of Appeals, as well as issues that could have been raised in his two previous Rule 32s but were not. Petitioner does not raise any issues that fall under the exceptions listed in Rule 32.1(d–h). Therefore, all claims are precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

---

<sup>1</sup>Although Jenkins characterized the 2008 petition as his “original” petition for post-conviction relief, it was his second, as we have noted; he filed his first notice of post-conviction relief in February 2004, followed by his original, of-right petition in March 2005.

<sup>2</sup>The claims Jenkins sought to assert, or reassert, were the following: the indictment was multiplicitous for charging attempted first-degree murder rather than second-degree murder; the indictment was multiplicitous for separately charging both aggravated assault with a deadly weapon and aggravated assault causing serious physical injury; sentencing Jenkins on four counts of aggravated assault constituted multiple punishment and violated the prohibition against double jeopardy; by employing Jenkins’s use of a gun and the infliction of serious physical injury both to enhance and partially aggravate his sentences, the court “double count[ed]” those factors and violated double jeopardy; the written plea agreement provided for “illegal enhancements” using the same two factors; although the state had dismissed its dangerous-nature allegations as part of the plea agreement, the same underlying facts were then used improperly to enhance and aggravate Jenkins’s sentences, violating his right to due process; trial counsel rendered ineffective assistance; and failure to comply with Rule 32 of the Federal Rules of Criminal Procedure violated Jenkins’s right to due process.

¶7 Having reviewed Jenkins’s petition below, we agree with the trial court that his latest claims either were actually raised in one of his two previous post-conviction proceedings or could have been raised in those proceedings and were therefore waived.<sup>3</sup> As a result, they were precluded, *see* Ariz. R. Crim. P. 32.2(a)(2), (3), and the trial court did not abuse its discretion in summarily dismissing Jenkins’s third petition for post-conviction relief.

¶8 In his petition for review, as he did in his petition below, Jenkins introduces each of his arguments with a general assertion that the issue raised is “of a constitutional magnitude.” He does so in the service of his rather cursory argument that any issue he has not previously raised cannot be deemed precluded without a showing that Jenkins had personally, knowingly, and voluntarily waived the opportunity to assert the right or raise the issue at an earlier stage. *See* Ariz. R. Crim. P. 32.2(a)(3) cmt. (“If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant ‘knowingly, voluntarily and intelligently’ waived the claim.”).

¶9 “The question whether an asserted ground is of ‘sufficient constitutional magnitude’ to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3) . . . does not depend upon the merits of the particular ground. It depends merely upon the particular right alleged to have been violated.” *Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002). Examples of those “relatively few rights” that will not be

---

<sup>3</sup>At least three of Jenkins’s current claims—those challenging the indictment and the terms of his plea agreement—he waived by pleading guilty. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (guilty plea waives all nonjurisdictional defects, including deprivations of constitutional rights). Thus, asserting those particular claims in either of his previous petitions would have been unavailing in any event.

deemed precluded absent a knowing, personal waiver by the defendant include the right to counsel, the right to a jury trial, and the right to a twelve-person jury. *Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954; *see also State v. Espinosa*, 200 Ariz. 503, ¶ 7, 29 P.3d 278, 280 (App. 2001).

¶10 Jenkins has neither demonstrated nor persuaded us that any of the issues the trial court found precluded implicates a right of sufficient constitutional magnitude that his personal waiver of the issue would have been required. We conclude that, for the “less significant constitutional right[s]” Jenkins has cursorily asserted in connection with each of his issues, “preclusion applies . . . without a showing that the defendant knowingly, voluntarily, and intelligently waived the right.” *Espinosa*, 200 Ariz. 503, ¶ 7, 29 P.3d at 280.

¶11 Finding no abuse of the trial court’s discretion, we grant the petition for review but deny relief.

---

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

---

JOSEPH W. HOWARD, Chief Judge

---

GARYE A. VÁSQUEZ, Judge